

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

USDC SDNY  
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ELECTRONICALLY FILED  
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DATE FILED: **JUN 18 2014**

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JAMLETH COLE,

Plaintiff,

-v-

COMMISSIONER OF SOCIAL SECURITY,

Defendant.  
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13-cv-7390 (KBF)

MEMORANDUM  
DECISION & ORDER

KATHERINE B. FORREST, District Judge:

Before the Court is defendant's unopposed motion to dismiss the complaint as time-barred. (ECF No. 10.) For the following reasons, that motion is GRANTED.

On May 31, 2012, an administrative law judge issued a decision finding that plaintiff had not established disability as defined by the Social Security Act and was not entitled to disability insurance benefits. (Stmt. of Def. Pursuant to Local Rule 56.1 ("Def. 56.1") ¶ 1, ECF No. 13.) Plaintiff then requested that the Social Security Administration's Appeals Council review the ALJ's decision. (Id. ¶ 2.) By a notice dated August 1, 2013, the Appeals Council advised plaintiff that his request to review the ALJ's decision was denied. (Id. ¶ 3; Compl. ¶ 7.) The Appeals Council mailed this notice to plaintiff at the same address as stated on the complaint, and also mailed this notice to plaintiff's attorney. (Compare Def. 56.1 ¶ 3 with Compl. ¶ 2, ECF No. 1; see also Decl. of Patrick J. Herbst ¶ 3(a), ECF No. 12.)

The Appeals Council's notice informed plaintiff that he had the right to commence a civil action within 60 days of receipt of the notice, which would be presumed to be five days after the date of the notice. (Def. 56.1 ¶ 4.) The last day to timely file a complaint was therefore October 7, 2013.<sup>1</sup> See 42 U.S.C. § 405(g) (setting forth the statute of limitations for judicial review of a decision by the Commissioner of Social Security). On October 21, 2013, plaintiff filed the instant complaint challenging defendant the Acting Commissioner of Social Security's determination that plaintiff was not entitled to disability insurance benefits. (ECF No. 1.)

Because plaintiff filed his complaint more than 60 days after receiving the Appeals Council's notice of an unfavorable decision, his complaint is time-barred. See 42 U.S.C. § 405(g); Bowen v. City of New York, 476 U.S. 467, 479 (1986) (stating that "the 60-day limit . . . is a condition on the waiver of sovereign immunity and thus must be strictly construed"); Califano v. Sanders, 430 U.S. 99, 108 (1977).<sup>2</sup> Furthermore, there is no evidence that "the government has hindered [plaintiff's] attempts to exercise [his] rights by acting in a misleading or clandestine way," so as to warrant equitable tolling of the 60-day period. Wong v. Bowen, 854 F.2d 630, 631 (2d Cir. 1988). Therefore, the deadline to timely file a complaint was October 7,

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<sup>1</sup> The Appeal's Council notice was dated August 1, 2013. Plaintiff is presumed to have received the notice five days later, on August 6, 2013. 60 days after August 6, 2013 was Saturday, October 5, 2013. Therefore, the last day to timely file a complaint was the next business day, Monday, October 7, 2013. See 42 U.S.C. § 405(g).

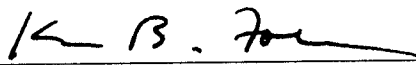
<sup>2</sup> The procedure set forth in 42 U.S.C. § 405(g) is the only means by which plaintiff can seek review of the Commissioner's decision. See 42 U.S.C. § 405(h) ("No findings of fact or decision of the Commissioner of Social Security shall be reviewed by any person, tribunal, or governmental agency except as herein provided.").

2013. Because plaintiff filed the complaint on October 21, 2013, the complaint is time-barred.

For these reasons, defendant's motion to dismiss the complaint is GRANTED. The Clerk of Court shall close the motion at ECF No. 10 and terminate this action.

SO ORDERED.

Dated: New York, New York  
June 18, 2014

  
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KATHERINE B. FORREST  
United States District Judge